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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN MANUEL AVELAR,

Defendant and Appellant.

G039835

(Super. Ct. No. 06CF1229)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

William J. Kopeny & Associates, and William J. Kopeny, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Ronald Jakob, Jennifer A. Jadovitz, and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Juan Manuel Avelar of first degree murder with special circumstances and street terrorism. (Pen. Code, §§ 187, subd. (a), 186.22, subd. (a); counts 1 & 2.)¹ The jury found true enhancements alleging the murder was gang related (§ 186.22, subd. (b)(1)), that Avelar was an active participant of a criminal street gang and committed murder to further the activities of the gang (§ 190.2, subd. (a)(22), and that he personally discharged a firearm proximately causing death (§ 12022.53, subs. (d) and (e)(1)) The court found Avelar had previously suffered two prior serious felony convictions under section 667, subdivision (a).

At the sentencing hearing, the court struck the gang enhancement associated with count 1, pursuant to *People v. Lopez* (2005) 34 Cal.App.4th 1002, and sentenced Avelar to life without the possibility of parole, plus a consecutive term of 30 years to life.

On appeal, Avelar argues he was deprived of a fair trial because the pretrial identification by witness Enrique Gonzalez was the result of an impermissibly suggestive police procedure, which then purportedly tainted Gonzalez's subsequent in-court identification. He also asserts the trial court denied him a fair hearing on the issue of the admissibility of the identification evidence by not allowing him to cross-examine Gonzalez during a pretrial hearing, and that the trial court improperly prevented him from impeaching Gonzalez's testimony during trial. Finally, he contends trial counsel rendered ineffective assistance of counsel, and that the effect of cumulative errors requires a reversal of the judgment. We find no merit in any of his assertions and affirm the judgment.

¹ All future references are to the Penal Code.

I

FACTS

On December 25, 2005, between 9:00 and 10:00 p.m., Enrique Gonzalez was washing his car in the alley of a residential neighborhood in Santa Ana. The alley was claimed by the Alley Boys criminal street gang. Juan Flores, Gonzalez's friend and a member of the Alley Boys gang, was in a nearby garage, which Flores apparently used for drug trafficking. As Gonzalez vacuumed the inside of his car, he noticed two other cars enter the alley at full speed. Gonzalez thought the cars might be undercover police officers so he continued vacuuming the inside of his car. However, when Gonzalez stood up, he saw two individuals standing about eight to ten feet behind him near the back of his car.

He described the person that stood the closest to him as a young, 15- or 16-year-old male, short in stature, with light brown skin, and wearing a hooded sweater. He described the second person as an older man, perhaps 28 years old, standing approximately five feet, nine inches tall and wearing a beanie and dark black sweater. He later identified Avelar as the older, taller individual, although Avelar reportedly stands six feet, two inches tall.

At trial, Gonzalez testified the younger man was holding a double-barreled shotgun and Avelar was holding a semi-automatic handgun when he first noticed them. He said the younger man asked him where he was from. Gonzalez, who disclaimed current membership in the Alley Boys gang, said he was from "nowhere." Avelar said, "Delhi." Gonzalez knew that the Delhi criminal street gang and the Alley Boys gang were rivals. Gonzalez told the two men that he was just washing his car, but Avelar again said, "Delhi." The younger man repeated the word, "Delhi," and Gonzalez responded, "all right." At this point, Gonzalez thought that the younger man appeared scared and not sure of what he was doing, and that it seemed he was waiting for Avelar to

do something. Eventually, the two men got back into their cars and drove off. According to Gonzalez, the incident lasted 10-15 minutes.

After they drove away, Gonzalez went inside Flores's garage and told him what happened. Within minutes, Gonzalez noticed that the same two individuals were standing at the other end of the alley, which was about 100 feet away from him.

Gonzalez testified that he heard several shotgun blasts followed by a series of shots from a handgun. He walked up to the scene of the shooting and saw Pedro Terran, an Alley Boys gang member, on the ground and bleeding beside a dumpster. Terran was being held by a girl, and she kept trying to get Terran to "come back." However, Gonzalez testified that he could tell Terran was dead. An autopsy revealed that Terran died from multiple gun shot wounds. A search of the crime scene produced 13 nine-millimeter shell casings, part of a shotgun shell, three bullets, and two shotgun pellets that were imbedded in a fence.

Gonzalez left the scene before police arrived. When he did speak to police officers the following March, he told them that he did not want to get involved and feared for his safety. Police officers initially contacted Gonzalez at his work and showed him a photographic lineup. He selected Avelar's photograph from this lineup, although at trial, he admitted there was some uncertainty in his mind whether the suspect was one of the six people in the lineup.

Police Officer David Rondou testified that Gonzalez focused on Avelar's photo, which was located on the bottom right portion of the six pack lineup, while he looked back and forth looking at the six photos. Rondou told Gonzalez, "You keep going back to one," referring to Avelar's photo, and Gonzalez responded that Avelar looked familiar. Gonzalez complained that the shooter was wearing a hat or beanie on the night of the incident. Rondou then placed his finger across the top of Avelar's photo, and Gonzalez said, "[I]t's hard for me to tell if you just put your thumb there." However, at the end of the interview, one of the officers handed Gonzalez the lineup card and asked

him to circle the photo of the person involved in the shooting. Gonzalez circled Avelar's photograph and initialed the card.

Avelar has multiple gang tattoos, including Delhi gang tattoos, and an expert testified he was an active participant of the Delhi gang. His former girlfriend, Amber Holdeman, testified that she and Avelar were in a relationship on the night of the incident, and she testified that he did not return home until 2:00 or 3:00 a.m. the night of the shooting. Avelar told Holdeman he had gone to the cemetery, but afterwards, he said that something had happened in the Alley Boys' claimed territory. He denied shooting anyone, but later showed her a newspaper story about the instant crime and said that was the incident he had mentioned earlier. He also asked Holdeman to cover for him, and told her that if the police came to the house, she was to say they had been together that night.

Avelar called his mother, Rosaura Balverde, to testify on his behalf. She was convinced of her son's innocence, but also revealed that Avelar was on parole the night of the murder and that the police had come to her home to question him about a murder sometime during January or February 2006.

II

DISCUSSION

The Pretrial Identification

Avelar claims the pretrial photographic identification procedure was unduly suggestive and unnecessary because the officers repeatedly pressured Gonzalez, told him they had spoken to other people and were told that he knew the shooter, and said that they knew Gonzalez went to school with the shooter.

On appeal, "[T]he standard of independent review applies to a trial court's ruling that a pretrial identification procedure was not unduly suggestive." (*People v. Kennedy* (2005) 36 Cal.4th 595, 609.) Furthermore, the test for determining whether a pretrial identification procedure was unlawful is well established. "[C]onvictions based

on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” (*Simmons v. United States* (1968) 390 U.S. 377, 384; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 990.) In reviewing the evidence, we are mindful that “[t]he burden is on the defendant to show that the identification procedure resulted in such unfairness that it abridged his rights to due process.” (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1051.)

Avelar contends the officers pressured Gonzalez into selecting his photograph from the photographic lineup, but he points to facts demonstrating no more than thorough police work to support this proposition. In fact, when questioned at trial, Gonzalez specifically denied that he felt pressured to select anyone from the lineup. Although Avelar contends the officers acted unlawfully by suggesting to Gonzalez that he might have gone to school with the shooter, the record reflects that Rondou merely asked Gonzalez *if* he knew the shooter from school. We fail to see how such a question can be construed as being “impermissibly suggestive.”

Nor do we find error because Rondou covered Avelar’s head with his thumb in attempt to replicate the look of someone wearing a hat, or in the fact that Rondou mentioned that Gonzalez seemed to favor one of the six photographs available. Under the circumstances, we conclude the out-of-court identification procedure was not unduly suggestive, and that Gonzalez’s pretrial identification of Avelar as the older, taller of the two assailants was reliable. Therefore, the trial court correctly admitted the identification evidence.

Avelar also contends the trial court’s ruling denied him a fair pretrial hearing on the issue. We disagree. At the hearing to determine the admissibility of Gonzalez’s out-of-court identification, the trial court listened to the audio recording of the interview, reviewed the transcripts prepared, and permitted counsel to question

Rondou. Although defense counsel requested the right to cross-examine Gonzalez at this hearing, the court was not required to grant his request. “A state criminal court is not required by the Due Process Clause of the Fourteenth Amendment to conduct a hearing out of the jury’s presence whenever a defendant contends that a witness’ identification of him was arrived at improperly.” (*Watkins v. Sowders* (1981) 449 U.S. 341, 341.)

We acknowledge that “[a] number of California decisions indicate that a hearing outside the presence of the jury is the proper procedure where a defendant asserts that an in-court identification of him would be tainted by an unduly suggestive pretrial identification procedure.” (*People v. Cooks* (1983) 141 Cal.App.3d 224, 306.) While the trial court determined a pretrial hearing was appropriate, Avelar still fails to establish the court erred by precluding an examination of Gonzalez at this hearing. As noted, the court listened to the audio recording of the police interview with Gonzalez and reviewed the transcripts of the interview. The court also permitted both sides to thoroughly examine Rondou. Defense counsel claimed the audio recording and transcripts were inaccurate, but the court found nothing to support this claim. Only after a careful review of the evidence presented did the court determine there was no cause to question Gonzalez and therefore, no justification for forcing the prosecution to produce its witness at that point in the proceedings, especially because Gonzalez was expected to testify at trial. We agree with the trial court’s limitation on the evidence. Furthermore, the evidence presented supports the court’s ruling on admissibility. As noted, Gonzalez later testified that he did not feel pressured to identify anyone from the photographic lineup. Consequently, the court properly denied defense counsel’s request to cross-examine Gonzalez at the pretrial hearing.

Next, Avelar argues the court erred by limiting defense counsel’s cross-examine of Gonzalez at trial, an error he contends amounts to a denial of his constitutional right to due process. Generally, “trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on [] cross-

examination.” (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.) We find no abuse of discretion here.

Under defense counsel’s cross-examination, Gonzalez admitted he had used “speed” on the day of the incident. He also admitted that he had gotten “high quite a few times” before that day. Defense counsel then asked if drug dealers let other people know what they are doing, which we assume was an attempt to link Gonzalez to Flores’s purported drug trafficking. The court sustained the prosecutor’s objection to this question on relevancy grounds. Defense counsel also asked Gonzalez to estimate how many times he had ingested methamphetamine before the shooting. The prosecutor objected to that question on grounds it called for irrelevant testimony and was inadmissible under Evidence Code section 352. The court sustained the prosecutor’s objection without specifying the ground. However, we fail to see how either of the court’s evidentiary rulings amounts to an abuse of discretion let alone a violation of Avelar’s constitutional rights.

No evidence admitted at trial linked Gonzalez to Flores’s purported drug trafficking and evidence of Gonzalez’ drug use prior to date in question was irrelevant to his ability to perceive events on that night. In fact, defense counsel’s continued questioning on either point most likely would have confused the jury and resulted in an undue consumption of time. Furthermore, Gonzalez admitted the relevant point, i.e., that he had ingested methamphetamine and was high at the time of the shooting. He claimed this did not impair his ability to perceive the events of that night. The weight to be given this testimony was for the jury to decide. (See *People v. Hawkins* (1995) 10 Cal.4th 920, 950, overruled in part, on other grounds, in *People v. Blakely* (2000) 23 Cal.4th 82, 89.) In any event, the court’s limitation on such evidence cannot be characterized as “arbitrary, capricious or patently absurd.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9.) Nor do we find, as appellate counsel suggests, that the court’s rulings establish “a pattern

of improper evidence which deprived the accused of a fair trial” The court’s evidentiary rulings were proper and did not violate Avelar’s constitutional rights.

Ineffective Assistance of Counsel

The standard for reviewing allegations of ineffective assistance of counsel is clearly established. “In order to demonstrate ineffective assistance, a defendant must first show counsel’s performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Second, he must show prejudice flowing from counsel’s performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]” (*People v. Williams* (1997) 16 Cal.4th 153, 214-215.)

Moreover, in considering whether counsel was ineffective we are cognizant that, “trial tactics are ordinarily within the sound discretion of trial counsel.” (*People v. Wright* (1990) 52 Cal.3d 367, 412.) “Tactical errors are generally not deemed reversible, and counsel’s decision making must be evaluated in the context of the available facts.” (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) Consequently, the burden to prove counsel was ineffective is not one that is easily met, and it “is defendant’s burden to demonstrate the inadequacy of trial counsel.” (*People v. Lucas* (1995) 12 Cal.4th 415, 436.)

Avelar claims trial counsel was ineffective for failing to object to the gang expert’s testimony that he had a tattoo that “could represent the Mexican Mafia” and another tattoo that “look[ed] like a prison tattoo.” He also alleges counsel was ineffective for calling his mother, Balverde, and thereby introducing evidence that he was on parole at the time of the instant offenses. We find no merit in either contention.

As noted, we give “great deference to the tactical decisions of trial counsel.” (*In re Fields* (1990) 51 Cal.3d 1063, 1069.) Here, a tactical reason for not

objecting to the expert's off-hand reference to the Mexican Mafia readily presents itself. Evidentiary objections during a witness's testimony tend to draw attention to that evidence, and there was nothing to be gained by drawing attention to this aspect of expert's testimony, especially because he only stated that two of Avelar's numerous tattoos *may have been* related to the Mexican Mafia. Therefore, counsel reasonably decided to remain silent in the face of a single fleeting reference to one of the most notorious criminal street gangs.

Similarly, calling Balverde as a witness allowed counsel to bolster the beneficial part of Holdeman's testimony. Balverde testified that Holdeman, Avelar's girlfriend, had said that Avelar denied shooting anyone immediately after the incident. Furthermore, Balverde adamantly denied her son's membership in a street gang. Although she inadvertently revealed Avelar's parole status at the time of the offense, we do not find counsel's decision to call Balverde as a witness to be unreasonable under the circumstances of this case. In short, Avelar fails to demonstrate that trial counsel's performance fell below an objectively reasonable standard.

Even assuming error, we find no basis for a reversal of the conviction. Gonzalez positively identified Avelar as one of the shooters. He stated Avelar possessed the handgun, and the autopsy confirmed that three of Terran's nine gunshot wounds were from a nine-millimeter handgun. Avelar denied shooting anyone, but he did tell Holdeman that he had been involved in a shooting, and he later identified Terran as the shooting victim from a newspaper article. Therefore, overwhelming evidence supports the verdict, and there is no reasonable likelihood of a more favorable outcome in the absence of counsel's asserted errors. (*People v. Prieto* (2003) 30 Cal.4th 226, 261.)

Alleged Cumulative Errors

Avelar contends cumulative error mandates reversal of the judgment. We have individually considered each claim of error and found none warranting a reversal of

the judgment. Thus, the asserted errors, whether considered individually or collectively, do not amount to a deprivation of rights guaranteed under either the state or federal Constitutions. Avelar was entitled to a fair trial, not a perfect one. (*People v. Box* (2000) 23 Cal.4th 1153, 1214.) He received a fair trial.

III

DISPOSITION

The judgment is affirmed.

SILLS, P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.